70-6

IN THE

Supreme Court of the United States

October Term, 1970.

No. ~~538~~.

NELLIE SWARB, et al.,

Appellants,

v.

WILLIAM M. LENNOX, et al.,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF OF AMICUS CURIAE PENNSYLVANIA SAVINGS AND LOAN LEAGUE.

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INTEREST OF *AMICUS CURIAE*, PENNSYLVANIA SAVINGS AND LOAN LEAGUE.

The Pennsylvania Savings and Loan League is an association of savings and loan institutions located throughout Pennsylvania. All parties have consented to the filing of this brief and the written forms of consent have been filed with the Clerk of the Supreme Court. In the court below an association known as The Insured Savings and Loan Associations of Philadelphia and Suburbs filed a brief as amicus curiae but, since the case has state-wide implications, the Pennsylvania Savings and Loan League was considered to be a more representative amicus.

The nature of the business of savings and loan associations is lending money for the purchase and development of real estate. In this connection, the common practice of the institutions represented by Amicus is to use a document called a "bond" or "bond and warrant" which evidences the debtor's promise to repay the loan, together with another document known as the mortgage which, upon recordation, constitutes a lien on the real estate providing security for the repayment of the debt. The "bond" or "bond and warrant" customarily contains an authorization to confess judgment against the debtor and, upon default, this authorization is used to obtain the judgment upon which execution will issue against the mortgaged real estate.

It should be noted here that savings and loan associations require that the mortgage be insured as a first lien upon the real estate securing repayment of the debt. Thus, there is always a "closing" or "settlement" of the loan conducted by a representative of the title insurance company insuring the lien of the mortgage. Typically, an attorney or real estate broker represents the buyer, who is borrowing money either to purchase real estate or improve it. Thus, professionals who have training and experience in the field are intimately involved in the bond and mort-

gage transaction and provide any explanations or assistance needed by the debtor in order to understand fully the terms of the documents he is asked to sign.

The constitutionality of all types of confession of judgment was challenged by appellants in the lower court and, although the attack on confession was successful as to certain types of transactions, the court was persuaded that there is no constitutional infirmity when the practice is used in bond and mortgage transactions. Accordingly, the court sustained the practice of confession as applied to bond and mortgage transactions. The court was persuaded that these transactions are materially different from many other types of consumer credit transactions. Moreover, the court concluded that the evidence submitted by appellants did not prove the existence of a class of persons which is being deprived of constitutional rights. The various safeguards surrounding bond and mortgage transactions prevent the abuses—real or imaginary—that appellants claim are present in other types of Pennsylvania credit transactions.

On this appeal, the Pennsylvania Savings and Loan League is seeking to sustain the practice of using confession of judgment clauses in bond and mortgage transactions. As of December 31, 1969, insured savings and loan associations in Philadelphia, Chester, Delaware, Bucks and Montgomery Counties had invested $2,666,728,000 in first mortgages on real estate. In Philadelphia alone, the figure is $1,622,029,000. Obviously, this is a critically important industry which is essential to the commerce and economic health of Pennsylvania. Also of significant interest is the fact that Philadelphia has the lowest mortgage interest rate of all major cities in the United States—a great benefit to the mortgage borrower.

Confessions of judgment are used in various types of instruments, e.g., leases, installment sales contracts, judgment notes, and bonds and warrants. Savings and loan

associations use confessions of judgment *only* in bonds and warrants accompanying mortgages, where the loan is used for the purchase or improvement of real estate, and the mortgage is given as security for repayment of the debt at the time the loan is made. The situation of these savings and loan associations is quite different from that of other creditors using confession of judgment.

SUMMARY OF ARGUMENT.

The Pennsylvania rules governing confession of judgment and execution give a mortgagor adequate notice and a fair opportunity to be heard on the merits of the underlying debt, by way of a petition to open the judgment, before he may be deprived of the use and enjoyment of his property. The petition to open judgment procedure is not unduly burdensome for the mortgage debtor; it is no more expensive than an ordinary complaint proceeding and the burden of proof is unchanged.

The Pennsylvania procedure comports with fundamental principles of fairness as have been heretofore established by the decisions of this Court and by common experience. This is not a case where a person is deprived of his sole means of support before having an opportunity to challenge in court the validity of the grounds alleged for so depriving him. In fact, nothing tangible is taken from the debtor before he is notified of the actions being taken against him and given a full and timely opportunity to have his "day in court". Pennsylvania has established a thorough procedure to guarantee that a debtor will not be deprived of his property without first having a minimum of twenty days' notice and an unrestricted opportunity to litigate his defenses in court. Thus, prior to losing possession of the property and prior to sale, the debtor is afforded a meaningful period of time within which to exercise his right to a judicial hearing.

Where property rights only are at stake, it has never been the law—except in unusual circumstances—that due process requires a hearing before judgment *so long as* a fair opportunity to be heard is provided at some meaningful stage of the proceedings. In the case of confession of judgment on bonds accompanying mortgages, no such unusual circumstances justifying an exception to the general

rule are present; on the contrary, there are valid and constitutionally sound reasons for affording mortgage creditors summary procedures for collecting delinquent debts. Furthermore, none of appellants' evidence on this point was directed to the circumstances presented when a debtor signs a bond and warrant accompanying a mortgage. Accordingly, the court below was correct in limiting the relief granted to the class of persons to which the evidence was addressed. The Pennsylvania confession of judgment procedure is not substantially different from the confession of judgment procedure in many other states and it is as fair as other forms of creditors' remedies found both in Pennsylvania and in other states.

Even if the Court finds that the Pennsylvania confession of judgment procedure infringes certain rights and thereby violates due process, such rights—like other constitutional rights—may be waived. But we submit that the confession of judgment procedure does not violate the Fourteenth Amendment, with or without a waiver.

ARGUMENT.

I. The Notice Requirements Imposed by the Pennsylvania Rules of Civil Procedure in a Confession of Judgment Proceeding Against a Mortgagor Satisfy the Due Process Requirements of the Fourteenth Amendment.

The Pennsylvania Rules of Civil Procedure provide the mortgagor with many opportunities to be informed of the actions being taken against him before he may be deprived of his property in a confession of judgment proceeding. The mortgage debtor is given notice of the mortgagee's right to confess judgment, notice of the entry of judgment, notice of the issuance of a writ of execution and notice of the proposed sale.

In order to foreclose on a mortgage in a confession of judgment proceeding, the mortgagee must give the following notices to the mortgage debtor of the entry of judgment and the time and place of the Sheriff's Sale:

(1) Philadelphia Court of Common Pleas Rule 3129(f)(1) provides that no execution shall issue to sell the mortgaged property upon a judgment entered on a bond unless the plaintiff has first notified the mortgage debtor and the owner of the property by certified mail of the date of the entry of judgment, with the court, term and number thereof. The Pennsylvania Rules of Civil Procedure provide that within twenty days of the date of entry of judgment the plaintiff must notify the debtor by ordinary mail of the same facts as those contained in the 3129(f)(1) letter plus the amount of the judgment. 12 Purd. Stat. App. R. C. P. 2958(a). The plaintiff must file of record an affidavit that such notices have been sent.

(2) In accordance with Philadelphia Court of Common Pleas Rule 3129(f)(2), the plaintiff must notify the

mortgage debtor by personal service or certified mail at least ten days before the date of the Sheriff's Sale of the place, date and hour of the sale. Rule 2958 provides that no sale may be held unless the debtor has been given at least twenty days' notice by ordinary mail of the Sheriff's Sale. 12 Purd. Stat. App. R. C. P. 2958. An affidavit that such notice has been sent must also be filed of record.

(3) Pennsylvania rules require that notice of the Sheriff's Sale must be given by the Sheriff by handbill posted in the Sheriff's Office and by posting of the property to be sold at least ten days prior to the sale. The notice must describe the property to be sold, its location, the improvements, if any, and must identify the judgment of the court giving rise to the sale, the name of the owner and the time and place of sale. 12 Purd. Stat. App. R. C. P. 3129(a).

(4) Notice containing the facts outlined in paragraph 3 must be given by publication by the Sheriff once a week for three successive weeks in a newspaper of general circulation and in the legal newspaper in the county where the real estate is located. The first advertisement must be at least twenty-one days before the date of the sale. 12 Purd. Stat. App. R. C. P. 3129(b).

The rules outlined above with respect to notice are reasonably calculated, under all the circumstances, to apprise all interested parties (debtors as well as record owners of the mortgaged property) of the pendency of an action and to afford them an opportunity to present their defenses prior to the Sheriff's Sale. This, of course, constitutes compliance with the requirements set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950) and *Schroeder v. New York*, 371 U. S. 208 (1962);

see also Milliken v. Meyer, 311 U. S. 457 (1940); *Grannis v. Ordean*, 234 U. S. 385 (1914). Not only is the mortgage debtor served with notice by ordinary as well as certified mail—a procedure approved as constitutional in *Mullane v. Central Hanover Bank & Trust Co., supra*—but the real estate (which is normally the residence of the mortgage debtor) is also posted with a handbill and the same information is published for three successive weeks in the county's legal newspaper and a newspaper of general circulation.

The facts set forth in these notices convey to all interested parties the relevant information. When provided with such notice, the mortgage debtor can easily determine the course of action he wishes to pursue. Furthermore, the amount of time afforded such debtors between the date of the entry of judgment and the final disposition of the case, which is approximately four or five weeks (and never less than twenty days) is clearly a reasonable and sufficient amount of time to take whatever steps are necessary to protect their property. *See Goodrich v. Ferris*, 214 U. S. 71 (1909).

While it is true that the notice given to the debtor does not advise him of his legal rights, we know of no authority which would require that such advice be given in a civil case in order to satisfy the notice requirements of the Fourteenth Amendment. Of course, the debtor is given complete notice concerning the entry of judgment and the intention of the creditor to sell the real estate secured by the mortgage, and this notice is given within ample time (at least twenty days and usually longer) for the debtor to request a hearing. For this Court to go further and hold such notice to be insufficient on the ground that due process requires that parties to *all* proceedings, civil as well as criminal, have to be given notice of their legal rights would certainly create havoc in our judicial system.

The notice requirements imposed by the Pennsylvania Rules of Civil Procedure are clearly sufficient to inform mortgage debtors of all relevant information before their property may be sold to satisfy the judgment. As a result, the debtor is given a full opportunity to request a hearing. Thus, the requirements of due process are satisfied and there is no violation of the Federal Constitution.

II. The Pennsylvania Confession of Judgment Procedure as Applied to Mortgagors Satisfies the Requirements of Due Process Because the Mortgagor Is Afforded a Fair Opportunity to Be Heard Before He Is Deprived of His Property.

Besides affording to the mortgagor abundant notice of the proceedings being taken against him, the Pennsylvania rules governing the confession of judgment method of foreclosure also give the debtor a fair opportunity to be heard not only as to the mortgagee's compliance with relevant procedural rules but also as to all of the merits of the controversy, including any issues presented which relate to the validity of the underlying debt. The mortgagor has this right to a hearing by virtue of the Pennsylvania common law and the Pennsylvania Rules of Civil Procedure, which give him the right to petition to strike the judgment and to petition to open the judgment. The right to be heard on the petition is an absolute right; the hearing is not granted as a matter of favor or courtesy but is guaranteed to the debtor by the Pennsylvania Rules of Civil Procedure and may not be waived. 12 Purd. Stat. App. R. C. P. 209; 7 Standard Pennsylvania Practice 138 (1961).

Appellant alleges that confession of judgment places an unfair burden on the debtor because it forces him to file a petition to strike or to open the judgment in order to set forth his defenses. We challenge the soundness of appellants' allegation that confession of judgment places an

unfair burden on the mortgagor. We submit that it is no more difficult or expensive for a mortgagor to file a petition to open judgment than it is to file an answer to a complaint. Contrary to appellants' allegation, the debtor is not required by law to pay the Sheriff's costs when filing a petition to open judgment, and the attorney's fees in each type of case would be approximately the same. *See generally,* Philadelphia Bar Association, Minimum Fee Schedule, March 23, 1971.

Appellants are also in error in asserting that a hearing on a petition to open judgment is more costly for the mortgagor than a hearing on a complaint. Appellants contend that the evidence presented in the hearing to open the judgment is limited to "expensive" depositions; however, this contention is unsupported and untrue. While the judge to whom the application is made acts as a chancellor in equity, he will consider and weigh evidence presented in the form of interrogatories, affidavits, exhibits and witnesses as well as depositions. 12 Purd. Stat. App. R. C. P. 2959(e). Once the mortgagor has succeeded in opening the judgment, the case may then be settled by the parties so as to obviate the need for a subsequent judicial proceeding. Even if subsequent proceedings are necessary, the legal expenses and court costs incurred in opening the judgment will generate savings in the following proceedings because no further pleadings are required in such circumstances—12 Purd. Stat. App. R. C. P. 2960—and because any depositions, interrogatories, affidavits or other evidence collected for the hearing on the petition to open can be used either as evidence in the subsequent proceedings or in lieu of pre-trial discovery.

Furthermore, appellants' contention that the mortgagor has a more difficult burden of proof on the issues presented when he petitions to open the judgment than he has in an ordinary complaint proceeding is unfounded. In

an ordinary complaint proceeding, the creditor makes out a prima facie case upon presentation of the debt instrument and the debtor has the burden of proving all affirmative defenses. *O'Neill v. Metropolitan Life Ins. Co.*, 345 Pa. 232, 239, 26 A. 2d 898 (1942); 12A Purd. Stat. § 3-307(1) and (2). Such defenses include (but are not limited to) accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, immunity from suit, impossibility of performance, laches, license, payment, release, res judicata, statute of frauds, statute of limitations and waiver. 12 Purd. Stat. App. R. C. P. 1030. The burden of proving these affirmative defenses remains with the debtor in a petition to open the judgment. The only change, in fact, *favors* the debtor: the burden of proof on the question of whether the signature to the bond or mortgage is genuine rests with the creditor. *Yank v. Eisenberg*, 408 Pa. 36 (1962). Furthermore, to place some of the burden of proof on the mortgagor is not in and of itself unconstitutional; this Court has held that to place the burden of proof upon the party who may eventually be deprived of property as a result of the outcome of a judicial hearing is not inconsistent with the dictates of due process. *United States v. Illinois Central R. Co.*, 291 U. S. 457 (1934).

The standard of proof to be met by the mortgage debtor in order to open a judgment is laid down by the common law of Pennsylvania. It is evident from a reading of the cases that this standard of proof is not burdensome; a petition will be denied only when the weight of the evidence is so against the petitioner that a trial court would have been obliged to reverse a jury verdict in his favor. *Jenkintown National Bank's Appeal*, 124 Pa. 337, 17 A. 2 (1889); *Budd v. Coyer*, 273 Pa. 309, 117 A. 449 (1922); *Harris v. Harris*, 32 D. & Co. Rep. 2d 14, 51 Del. Co. Rep. 10 (1963). Even if the Court finds that the standard of proof required of

the petitioner is unduly burdensome and, therefore, an unconstitutional encumbrance on his right to a fair hearing, it does not follow that confession of judgment is also unconstitutional. In that event, it will be sufficient for the Court to rule that the burden must be lightened. In other words, the thrust of appellants' attack should be against the standard adopted by common law rather than against the statute itself.

Thus, a mortgagor in Pennsylvania has—as a matter of right—a full opportunity to present at a judicial hearing all his defenses with respect to any judgment entered by confession. It should also be kept in mind that during the pendency of these judicial proceedings the mortgagor continues to have the unrestricted beneficial use of the real estate securing the debt.

III. Confession of Judgment as Applied to Mortgagors Satisfies Fundamental Principles of Fairness and, Therefore, Accords Due Process.

What kind of notice and opportunity for a hearing constitutes "due process of law" is a question that can be answered only by weighing and balancing the various interests involved, but the State's determination of which interests are to prevail as manifested by the procedure it has adopted should be upheld unless it violates fundamental principles of fairness. *Joint Anti-Fascist Committee v. McGrath*, 341 U. S. 123, 162 (1951) (Frankfurter, J. concurring); *Cafeteria Workers v. McElroy*, 367 U. S. 886 (1961); *Communications Comm. v. W. J. R.*, 337 U. S. 265, 275 (1949); *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 18 How. 272 (1856). Due process does not require a pre-judgment hearing in all cases, but only that there be a reasonable opportunity to be heard and to present all defenses at some meaningful time and in some

meaningful manner. *American Surety Co. v. Baldwin*, 287 U. S. 156, 168 (1932); *Coffin Bros. v. Bennett*, 277 U. S. 29, 31 (1928); *Philips v. Commissioner*, 283 U. S. 589, 596-97 (1931); *Armstrong v. Manzo*, 380 U. S. 545, 552 (1965).

Coe v. Armour Fertilizer Works, 237 U. S. 413 (1915), relied on by appellants, does not support their position. In contrast to the rights of notice and an opportunity to be heard guaranteed to debtors under Pennsylvania law, no such rights were guaranteed by the Florida statute in *Coe*. That case involved an execution pursuant to a Florida statute upon the personal assets of a stockholder of an insolvent corporation. The stockholder had no right to official notice of the proceedings against him and was given no opportunity at any time to raise all of his procedural and substantive defenses. He was afforded a hearing only on the question of whether he was, in fact, the owner of stock upon which there was an unpaid subscription and on whether the amount of the execution upon his personal assets exceeded the unpaid subscription. Under the Florida statute:

> ". . . [I]f the person against whom the execution is issued is not in fact a holder of stock upon which there is an unpaid subscription, or if the amount of the execution exceeds the unpaid subscription, he may have relief . . . and . . . in the absence of such objection on his part, the execution is enforced, although there may have been only a formal levy, without even such notice to the owner of the property as might be implied from a forcible seizure or an interference with his possession." 237 U. S. at 422.

This Court held that Florida's procedure was a denial of due process, stating:

> ". . . [B]efore a third party's property may be taken to pay [the] . . . indebtedness upon the ground that he

> is a stockholder and indebted to the corporation for an unpaid subscription, he is entitled, upon the most fundamental principles, to a day in court and a hearing upon such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself." 237 U. S. at 423.

Since the only hearing available to the stockholder excluded all evidence except that concerning his status as a stockholder, to render judgment against him amounts to adjudicating matters not within the pleadings and not in fact litigated.

> "To do this without his consent—and the record shows no consent—is contrary to fundamental principles of justice." 237 U. S. at 426.

In the case at bar, there has been no failure to provide mortgage debtors with notice and an opportunity to be heard. In contrast to the Florida statute, the Pennsylvania Rules of Civil Procedure provide for official notice and for a full hearing at which the mortgagor can raise all his defenses to the underlying debt.

Insofar as property rights are concerned, as long as due process rights are assured to the parties at some meaningful stage of the proceedings, there is no constitutional violation; "The 14th Amendment is not concerned with the form." *Coffin Bros. v. Bennett*, 277 U. S. 29, 31 (1928). For example, in *Fahey v. Mallonee*, 332 U. S. 245 (1947), the Court found that the placing of a savings and loan association in the custody of a conservator prior to a hearing—pursuant to the regulations governing the Federal savings and loan system and in accordance with established

custom—was not unconstitutional. In *Ewing v. Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950), the Court held that the Administrator enforcing Section 304(a) of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. § 304(a), could find probable cause of misbranding of articles without a hearing. Such a finding of probable cause permitted the removal from the market of the misbranded article and authorized the commencement of private actions for damages based on the finding of misbranding. In spite of the hardship and the deprivation of property involved, Justice Douglas, writing for the majority, concluded that there was no violation of the due process clause of the Fourteenth Amendment, saying:

> "It is sufficient, *where only property rights are concerned,* that there is at some stage an opportunity for a hearing and a judicial determination." 339 U. S. at 599. (Emphasis added.)

On the other hand, in *Sniadach v. Family Finance Corporation,* 395 U. S. 337 (1969), where the Court was confronted with an attack on a Wisconsin statute which authorized pre-judgment garnishment of wages before any judicial determination of the rights of the parties, the procedure was found to violate due process. We agree that such a freezing of wages is fundamentally unfair. But, as this Court observed, wages are a very special type of property and the decision was made with specific reference to wages. The problems and deprivations involved in freezing a man's wages are totally different from those involved in providing an expeditious procedure for the foreclosure of mortgages where the property is already subject to the lien of the mortgage and where there is *no actual taking* of property before the debtor has an opportunity to be heard. While we endorse the decision in *Sniadach,* we say that it

does not apply to this case because of the rationale underlying it.

> "The result is that a pre-judgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall . . . [and hence] violates the fundamental principles of due process." 395 U. S. at 341-342.

Pennsylvania does not even permit *post*-judgment garnishment of wages, and for very sound reasons, for the concept of attaching wages in the hands of an employer is indeed an oppressive means of collecting a debt.

In reaching its decision in *Sniadach*, the Court emphasized that the garnishment of wages is a unique procedure and constitutes a significant taking of property, since it imposes a tremendous hardship upon the wage earner living near the subsistence level, to whom even the temporary loss of a few dollars may be catastrophic. Further, the Court was concerned that a worker might lose his job because the employer finds it troublesome to administer the garnishment.

It is significant that in *Balthazar v. Mari*, 301 F. Supp. 103 (N. D. Ill.), *aff'd.* 396 U. S. 114 (1969), the Court rejected a contention based on *Sniadach* that the summary sale of property on a tax lien constituted a deprivation without due process. In pointing out that wages are unique, the Court reiterated the language of the majority opinion in *Sniadach:*

> "The Supreme Court's recent garnishment decision, *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349, is inapplicable. 'We deal here with wages—a specialized type of property presenting distinct problems in our economic system.' 37 L. W. 4520." (Emphasis added.) 301 F. Supp. at 105, n. 5.

Appellants also rely on *Goldberg v. Kelly*, 397 U. S. 254 (1970) which, following the logic of *Sniadach*, required a hearing before welfare payments could be terminated. But *Goldberg* is essentially the same case as *Sniadach*. In both cases the primary concern of this Court was to protect against the possibility of summarily cutting off income needed to provide basic living conditions. If anything, the decision in *Goldberg* is narrower than the decision in *Sniadach* because—by definition—welfare payments are the sole means of support of the recipient.

The entry of judgment by confession pursuant to authority contained in a bond accompanying a mortgage on real estate simply does not work the kind of hardship or deprivation on any class, rich or poor—especially mortgagors—which caused the Court to strike down pre-judgment garnishment in *Sniadach*. For in Pennsylvania the debtor retains the beneficial use and enjoyment of the real estate upon which the savings and loan association executes until final disposition of the proceedings. Before such final disposition can occur, the debtor is given notice of the proceedings and a fair opportunity (a minimum of twenty days and usually longer) to obtain a hearing on the merits by simply filing a petition to open the judgment.

The State has an interest, not only in conserving financial resources by providing summary remedies, but also in making available adequate remedies to creditors so that credit transactions, upon which the economic welfare of the State depends, are made available on a low-cost basis to the broadest range of consumers. It is notable that Philadelphia has the lowest mortgage interest rate of all major cities in the United States. Attached to the brief filed by The Insured Savings and Loan Associations of Philadelphia and Suburbs in the court below is a copy of a report distributed by the Federal Home Loan Bank Board on January 29, 1970. The last two pages of this report show the interest

rates charged in various cities throughout the country. For December, 1969, Philadelphia's interest rate was 7.06%; this is the lowest rate in the nation. The rates range from Philadelphia's low of 7.06% to a high in Denver of 8.78%. One of the factors which affects the mortgage interest rate in Philadelphia is the long established and relatively simple method of foreclosure, made possible by the ability to confess judgment against a delinquent mortgagor. To abolish this effective means of foreclosure will undoubtedly start to channel mortgage money out of Pennsylvania and this, in turn, will cause the prevailing rate of interest in Pennsylvania to increase.

The Pennsylvania confession of judgment procedure can be accomplished in approximately four weeks. If a petition to open the judgment is filed, it can be adjudicated, in the County of Philadelphia, within a few months. If confessions of judgment are held to be illegal, the alternative procedure will be a complaint in mortgage foreclosure. This complaint must be served on the mortgagor by the Sheriff and, once service has been made, the defendant has twenty days to file an answer. In his answer, the mortgagor can demand a jury trial and, if he does, it will take as long as five years (in the County of Philadelphia) before the matter goes to trial. During all of this time, the savings and loan association can take no action, even if the mortgagor makes no payment whatsoever.

Time is of the essence when a defaulting mortgage borrower is the resident of the property, for he will frequently vacate the property, thereby exposing it to vandalism. When the mortgage borrower abandons the property, the exposure to vandalism and the absence of occupants to maintain the property depresses the market value and this jeopardizes the mortgage lender's security. This also works to the detriment of the debtor, because it increases the probability that the proceeds of the sale will be insuffi-

cient to satisfy the creditor's claim and that the creditor will seek to establish a deficiency judgment.

The mortgagee will be further impeded in collecting from the mortgage debtor if Pennsylvania's confession of judgment procedure is declared unconstitutional because more than one full-dress judicial action may be necessary to collect the full amount of the debt. If the mortgagee has to proceed by complaint in mortgage foreclosure, the judgment he obtains will be an *in rem* judgment; and, consequently, he will have to proceed again in assumpsit to collect any deficiency that may arise if the proceeds of the execution sale do not equal the unpaid balance of the mortgage. In addition, after the *in rem* judgment is obtained and execution is completed and before he may proceed to bring an action in assumpsit, the mortgage creditor must, if he is the purchaser at the execution sale, petition the court to have the fair market value of the premises ascertained. This value, rather than the sale proceeds, determines the amount of the deficiency. If the mortgagee fails to petition the court for this purpose within six months, he forfeits any deficiency he might otherwise have obtained. All interested persons must be served with the petition and they may file answers to the averments of the petition. A hearing must be held not sooner than ten days after the petition is served. 12 Purd. Stat. § 2621.1 *et seq.*; *United States v. Shimer*, 367 U. S. 374 (1961); *Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Watt*, 151 F. 2d 697 (5th Cir. 1945).

Another complication which arises if a mortgagee can proceed only by complaint in mortgage foreclosure is a consequence of the Federal Tax Lien Act of 1966, Pub. L. 89-719, 80 Stat. 1125. Unlike a confession of judgment proceeding, where the mortgagee proceeds by complaint and there is a Federal tax lien on the real estate to be sold, the Government must be made a party to the suit. 26 U. S. C. A.

§ 7425 (1967).[1] After judgment has been taken, plaintiff can proceed with execution and sale but the property remains subject to the Government's right of redemption for as long as a year.[2]

Appellants contend that confession of judgment exists in only a few states and, by limiting their remarks to confession of judgment, they imply that almost all states have abolished summary procedures for the enforcement of creditor's claims. But this is simply not true.

First, confession of judgment exists in substantially the same form as it does in Pennsylvania in a majority of states. In none of the statutes cited below is the debtor given more protection, more notice or opportunity to be heard than the mortgage debtor is given under the Pennsylvania procedure: *Alaska,* Alaska Statutes Sec. 09.30.050 (1962); *California,* West's Ann. C. C. P. § 1132 (1955); *Colorado,* C. R. S. 1963 § 13-16-6 (1963); *Delaware,* 10 Del. C. § 3908 (1953); *Idaho,* Idaho Code § 10-901 (1949); *Illinois,* S. H. A. ch. 110 § 50 (1966); *Iowa,* Iowa Code Annotated 676.1 (1951); *Maine,* 9 M. R. S. A. § 3724 (1964);

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1. A substantial problem arises under the Federal Tax Lien Act if plaintiff must utilize the complaint method rather than the confession of judgment method. If a search discloses that a Federal lien has been filed against the mortgagor, and plaintiff is proceeding by confession of judgment, the lien can be discharged simply by giving the United States Government twenty-five days' notice of the sale. 26 U. S. C. A. § 7425(b) and (c) (1967). On the other hand, if plaintiff is proceeding by complaint in mortgage foreclosure, the Government must be named as a party and must be served with a copy of the complaint. The Government then has sixty days in which to file an answer. 28 U. S. C. A. § 2410 (1965), *as amended* (Supp. 1971); 38 Pa. Bar Assn. Quarterly 92, 93-4 (Oct. 1967).

2. If a Federal tax lien is involved, the Government has 120 days after the sale in which to redeem the property, but if another type of lien is involved, the Government has one year in which to redeem. 28 U. S. C. A. § 2410(c) (1965), *as amended* (Supp. 1971). Under the confession of judgment procedure, the Government has only 120 days to redeem regardless of the type of lien it holds. 26 U. S. C. A. § 7425(d) (1967).

Michigan, M. C. L. A. § 600.2906 (1967); *Minnesota*, M. S. A. § 548.22 (1964); *Missouri*, V. A. M. S. § 511.070 (1969); *Nebraska*, R. R. S. 1943 § 25-1309 (1970); *New Jersey*, N. J. S. A. 2A:16-13 (1968); *New York*, C. P. L. R. § 3201, § 3218 (1963); *North Carolina*, General Statutes of North Carolina § 1A-1, Rule 68.1 (1964); *North Dakota*, North Dakota Century Code, Rules of Civil Procedure, Rule 68(e), North Dakota Century Code, 51-13-02 (1960); *Ohio*, Page's Ohio Revised Code Annotated § 2323.12 (1968); *Oklahoma*, 12 Okl. St. Ann. § 689 (1958); *Oregon*, O. R. S. § 26.110 (1969); *South Carolina*, Code of Laws of South Carolina 1962 § 10-1535 (1962); *South Dakota*, S. D. C. L. 1967 Sec. 21-26 (1969); *Utah*, Utah Code Annotated 1953, Rules of Civil Procedure, Rule 58A(e) (1953); *Virginia*, Code of Virginia 1958 § 8-356 (1966); *Washington*, R. C. W. A. 4.60.050 (1962); *West Virginia*, West Virginia Code § 56-4-48 (1966); *Wisconsin*, W. S. A. 270.69 (1966); *Wyoming*, Wyoming Statutes 1957 § 1-309, § 1-312 (1959). If the Pennsylvania procedure is unconstitutional, so must all the other states' confession of judgment procedures be unconstitutional.

Second, other summary procedures for the protection of creditor's interests—which afford no more notice or opportunity to be heard than the Pennsylvania confession of judgment procedure—are quite common. For example, under the Uniform Commercial Code, Sec. 9-503, a secured creditor may take possession of his collateral upon the debtor's default without judicial action provided only that no breach of the peace occurs. If a secured creditor chooses to proceed instead with the aid of the courts, he is entitled to replevy the property. In either case, the debtor is deprived of possession of his property before there has been any opportunity for a judicial determination of his rights under the security agreement. This procedure gives less protection to the debtor than the Pennsylvania confession

of judgment procedure: in the one case he loses his property before being heard and in the other he retains his property and merely suffers an encumbrance before being heard. If Pennsylvania's confession of judgment procedure violates due process, so must many of these other creditor's remedies. We note that several suits have already been brought challenging the constitutionality of replevin actions, e.g., *Epps, et al. v. Cortese, et al.*, Civil No. 70-2592 (E. D. Pa., Mar. 31, 1971).

Similarly, in the case of loans secured by mortgages on real estate, it is common practice in a great number of states to use deeds of trust. Under the deed of trust procedure, the debtor places title to the mortgaged real estate in a trustee who is authorized, upon default, to advertise the real estate for sale, hold an auction sale and transfer title to the successful bidder upon payment of the bid price. The proceeds of the sale are applied—in accordance with the terms of the deed of trust—first on account of the creditor's claim and then to the equitable owner. The deed of trust procedure, with only minor variations from state to state, is used in the following states: Alabama, Alaska, Arkansas, California, District of Columbia, Georgia, Hawaii, Idaho, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, Wyoming.[3]

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3. *Alabama,* Code of Ala. Tit. 47 §§ 164-171 (1960); *Alaska,* Alaska Statutes § 34.20.70 (1962); *Arkansas,* Arkansas Statutes 1947 § 51-1112, § 51-1113 (1962); *California,* West's Ann. C. C. P. § 692 (1955); *District of Columbia,* D. C. C. E. § 45-615 (1966); *Georgia,* Ga. Code Ann. § 37-607, § 37-608 (1935); *Hawaii,* H. R. S. § 667 (1968); *Idaho,* Idaho Code § 45-1502-15 (1949); *Maine,* 14 M. R. S. A. §§ 6201-6204 (1964); *Michigan,* R. J. A. §§ 3201-3280, 1964, No. 102; *Minnesota,* M. S. A. § 580-01 (1964); *Mississippi,* Mississippi Code 1942 Ann. § 888 (1964); *Missouri,* V. A. M. S. § 443.310 (1969); *Montana,* Revised Codes of Montana 1947,

If confession of judgment in Pennsylvania is unconstitutional, the deed of trust procedure is also unconstitutional, for the Pennsylvania procedure is considerably more solicitous of the interests of the debtor than the deed of trust procedure that prevails in at least twenty-nine states. For example, in Pennsylvania, the auction sale is conducted pursuant to the Rules of Civil Procedure under the supervision of the Court of Common Pleas. Obviously, this provides protection to debtors that is not available in the case of a sale made by a private trustee pursuant to the terms of a deed of trust.

Appellants submitted evidence in the lower court to the effect that the Pennsylvania confession of judgment procedure was fundamentally unfair and therefore a violation of due process, but we wish to point out that none of this evidence concerned situations where the debtor had signed a bond and warrant accompanying a mortgage. Whether or not the Pennsylvania confession of judgment procedure is fair depends upon the nature of the document signed and the circumstances surrounding its signing.

> "Whether the . . . procedure . . . duly observe[s] 'the rudiments of fair play,' . . . cannot, therefore, be tested by mere generalities or sentiments abstractly appealing. The precise nature of the interest that has

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§ 70-616 (1957); *Nebraska,* R. R. S. 1943 §§ 76-1001 to 76-1018 (1970); *Nevada,* N. R. S. §§ 107.010 to 107.080 (1963); *New Hampshire,* R. S. A. c. 479 §§ 25-27 (1955); *New York,* Real Property Actions and Proceedings Law §§ 1401-1403 (1963); *North Carolina,* General Statutes of North Carolina 45-2A (1964); *Oklahoma,* 46 Okl. St. Ann. § 31-9 (1958); *Oregon,* O. R. S. 86.710 (1969); *Rhode Island,* General Laws of Rhode Island 34.27.1, 34.24.4, 34.11.22 (1957); *South Dakota,* S. D. C. L. 1967 21-48-1 (1969); *Tennessee,* Tennessee Code Annotated §§ 35-501 to 35-511 (1955); *Texas,* Vernon's Ann. Civ. St. Art. 3810 (1964); *Virginia,* Code of Virginia 1950 § 55-59 (1966); *Washington,* R. C. W. A. 61.24.030 (1962); *West Virginia,* West Virginia Code, c. 38, art. 1 § 3.84 (1966); *Wisconsin,* W. S. A. c. 297 (1966); *Wyoming,* Wyoming Statutes 1957, Secs. 34-63, 34-64, Sec. 34-68-70 (1959).

> been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed . . . , the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment." *Joint Anti-Fascist Comm. v. McGrath,* 341 U. S. 123, 163 (1951) (Frankfurter, J., concurring).

Appellants' evidence pertained only to cases of consumer installment loans and consumer installment sales contracts; *not one* of the named appellants in this case is a mortgagor complaining about a savings and loan association. Mortgage transactions were not included in the Caplovitz survey or in the testimony of any witness except for Miss Mims and Mr. Casnoff and the testimony they gave pertaining to mortgages was favorable to our position. Miss Mims testified that when she obtained a purchase money mortgage on her home, she was represented by counsel at the settlement (N. T. 62, May 14, 1970). Mr. Casnoff testified that in all the settlements he attended after his admission to the Bar, the mortgagor was represented by an attorney or real estate broker (N. T. 105-110, May 14, 1970). Whether or not the attorney or real estate broker explained to the mortgagor the meaning of the confession of judgment clause, their knowledge and understanding of its significance is imputable to the mortgagor. The Opinion of the lower court notes the absence of evidence relating to mortgage transactions at page 12, 314 F. Supp. 1091, 1098-1099 (E. D. Pa. 1970).[4]

4. The lower court's awareness of the lack of evidence relating to bond and mortgage transactions is clearly shown by its discussion with counsel on May 14, 1970; see N. T. 24-25, May 14, 1970, where the court referred to the distinction made by Mr. Caplovitz and others between the mortgage transaction and other types of confessed judgments. See also, on the same point, N. T. 6-7, 30-31, June 22, 1970.

We also refer the Court to the Stipulation of Counsel dated January 29, 1970—regarding what certain witnesses would say if called to testify—which contains generalizations that are inaccurate when applied to savings and loan associations: (1) The usual attorney's fee contained in a bond and warrant is 5% rather than the figure of 15% to 20% mentioned in the Stipulation. The higher percentage may appear in the confessions utilized by other creditors, but not in the bond and warrant utilized by savings and loan associations; (2) The statement that the debtors were not aware of or did not understand the confession clause does not apply to mortgagors since they are represented at settlement by an attorney or real estate broker, who has the duty of explaining to the mortgage borrower the terms of the documents he is signing; (3) The statement that the contract was forced upon the debtors, that judgment was entered prior to default, that the first notice was that a Sheriff's Sale had been scheduled and that the debtors have defenses such as forgery, failure of consideration, non-default, delivery of defective goods, breach of warranty, etc., is also inapplicable to bond and mortgage transactions.

First of all, there is no evidence of any high pressure tactics having been used on a mortgagor in an attempt to obtain his signature. In addition, the Federal Truth-in-Lending Act, 15 U. S. C. A. § 1635(a) (Supp. 1971), gives the mortgagor a three day right of recision after he has signed the documents in any case where an existing loan secured by real estate has been refinanced (e.g., where the terms of the loan have been changed at the borrower's request) or where the loan is made to a borrower who already owns his home but wishes to borrow on the security of it. The Court can readily see that there is ample time not only for the mortgagor's attorney or broker to explain the confession of judgment procedure, but also time for the mortgagor to escape a document "forced upon him."

Secondly, the defenses that could be raised by the signers of installment loans or installment sales contracts (such as breach of warranty, failure of delivery, etc.) are not available where savings and loan associations lend for the purpose of financing the acquisition of real estate. The mortgagee neither sells the property securing the loan nor buys consumers' notes from sellers of property. On the contrary, the mortgagor purchases the property from an unrelated third party. Consequently, the range of possible defenses is substantially circumscribed and their nature vastly simplified. The normal mortgage foreclosure does not arise out of a dispute concerning the quality or performance of the item sold; instead, the creditor forecloses because the mortgage debtor simply has failed to make his payments.[5]

Appellants' argument that Pennsylvania's confession of judgment procedure is fundamentally unfair failed to address itself to the unique circumstances presented when a borrower signs a bond and warrant accompanying a mortgage. No evidence was presented to the court below that would indicate a need to abolish confession of judgment as applied to mortgage debtors. Even assuming *arguendo* that some of appellants' evidence did relate to bond and mortgage transactions, appellants failed to present any evidence of unfairness or overreaching sufficiently persuasive to justify this Court in overturning a determination made by the Pennsylvania Legislature as to how the interests of the mortgage lender, the mortgage borrower and the State are to be accommodated.

Appellants' allegation that, since the decision of the lower court was announced, bonds and warrants accompanying mortgages are being used in ordinary consumer installment financing agreements is *dehors* the record and its

5. Any defenses that the mortgage borrower could raise with respect to his purchase are an independent matter and are not adversely affected by the rights of the mortgage lender. Such defenses can always be asserted against his seller.

validity cannot be tested without a rehearing. We respectfully submit that it should be disregarded. The lower court was correct in determining that a narrower definition of the plaintiff class than is here requested by appellants was warranted, for it is well settled that a rule of constitutional law is not to be formulated "broader than is required by the precise facts to which it is to be applied." *Steamship Co. v. Emigration Commissioners,* 113 U. S. 33, 39 (1885). It is clear that the trial court had legal authority to redefine the class; such authority is expressly granted in Fed. R. C. P. 23(c) and (d). *See also Pelelas v. Caterpillar Tractor Co.,* 113 F. 2d 629, *cert. denied,* 311 U. S. 700 (1940); *Sam Fox Pub. Co. v. United States,* 366 U. S. 683, 691 (1961); *Hansberry v. Lee,* 311 U. S. 32 (1940). Whether a class action will fairly insure adequate representation of all members of the class, as required by the Federal Rules, is a question of fact for the trial court and its determination should not be disturbed unless clearly erroneous. *Pelelas v. Caterpillar Tractor Co., supra; Weeks v. Bareco Oil Co.,* 125 F. 2d 84, 93-4 (7th Cir. 1941).

If the distinctions between the subclasses created by the lower court are not clear cut, the reason may be that the class sought to be represented by the appellants is simply too broad and heterogeneous and has too great a disparity of interests for a court to recognize this suit as a class action. *Chavis v. Whitcomb,* 305 F. Supp. 1359, 1363 (D. C. Ind. 1969). Courts have held that a class action is not proper where the ". . . description of the purported class depends upon the state of mind of a particular individual, rendering it difficult, if not impossible, to determine whether any given individual is within or without the alleged class." *Chaffee v. Johnson,* 229 F. Supp. 445, 448 (S. D. Miss.), *aff'd,* 5th Cir., 352 F. 2d 514, *cert. denied,* 384 U. S. 956 (1966); *accord Koen v. Long,* 302 F. Supp. 1383, 1388 (E. D. Mo.), *aff'd,* 428 F. 2d 876 (8th Cir. 1970). Many

of the allegations made by appellants as grounds for relief in the case at bar, such as duress, lack of understanding, overreaching, etc., go to the state of mind of the individuals involved and defy categorization by classes in such a way that the members of the class are "capable of definite identification as being either in or out of it." *Chaffee v. Johnson*, 229 F. Supp. at 448.

Appellants' attempt to broaden the class is particularly unfair because they failed to join as parties to this action mortgagees and other creditors who would be affected by the judgment. Nevertheless, they sought a decree that would prevent mortgagees from using the confession of judgment method of foreclosure. Amicus represents such mortgagees, but this is no substitute for being a party to the case. Not only does such exclusion prevent adequate notice of the course of the proceedings and of the arguments of the parties and of the various amici, but it also prevents such mortgagees from presenting evidence and testimony in support of their position. Consequently, several factual misstatements in the record and in appellants' brief could not be refuted except by unsupported allegations that were clearly *dehors* the record and, therefore, improper. We note that the attorneys for appellants have already filed another action in the Eastern District of Pennsylvania which specifically seeks to have the Pennsylvania practice of confession of judgment declared unconstitutional as applied to debtors who sign bonds and warrants accompanying mortgages and they again proceeded by suing to enjoin the Sheriff and the Prothonotary, who are not interested in the outcome of the suit, leaving it to the real parties in interest to intervene as parties or as amici at the discretion of the court, if and when they obtain notice of such a suit. *Jamerson v. Lennox*, 321 F. Supp. 656 (E. D. Pa., 1970). In *Jamerson* appellants joined a few real parties

in interest as additional defendants only after the court refused to hear the case unless they did so.

IV. Even If the Fourteenth Amendment Guarantees Rights Not Provided By the Confession of Judgment Procedure, Such Rights—Like Other Constitutional Rights—May Be Waived.

In Pennsylvania the creditor is not permitted to confess judgment unless the debtor has authorized him to do so in writing. The authority to confess judgment is contained in the warrant accompanying or made part of the bond that the debtor signs at the time of closing the loan. This Court has held that a debtor may consent to the entry of judgment without prior notice and without a prior hearing, for a person may effectively waive his constitutional rights. In *American Surety Co. v. Baldwin*, 287 U. S. 156, 168 (1932), the Court found that the confession of judgment pursuant to a power of attorney in a supersedeas bond without any prior hearing was effective because:

> "... [T]he surety company *consented* to the entry of judgment against it without notice for his failure to pay." 287 U. S. at 168. (Emphasis added.)

In a more recent case the Court again held that consent will operate to waive the benefit of a constitutional right. *National Equipment Rental Ltd. v. Szukkert*, 375 U. S. 311 (1964). In this case the defendants, who resided in Michigan, signed a contract authorizing plaintiff to serve them in New York. Defendants later contended that service in New York was ineffective under the Fourteenth Amendment, but the Court rejected this argument, saying:

> "... [I]t is settled as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisdiction of a given court to permit notice to

be served by the opposing party, *or even to waive notice altogether.*" 375 U. S. at 315-316. (Emphasis added.)

This Court in both cases enforced the waivers in spite of the fact that the Fourteenth Amendment, in the absence of a waiver, would have justified the opposite result. *See also, Pierce v. Somerset R. Co.*, 171 U. S. 641 (1898); *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 407 (1917).

The mortgage debtor in Pennsylvania is invariably represented by an attorney or a real estate broker and he is advised at settlement of the creditor's rights. Attorneys and realtors are quite familiar with the standard forms of bonds and mortgages and, of course, they have no difficulty in explaining the terms to the borrower. All Pennsylvania borrowers sign contracts from time to time that contain confession of judgment clauses. The lawyers in this case have no doubt signed such contracts on numerous occasions.

In the cases discussed above—which were civil proceedings—this Court held that a person may waive rights granted to him by the Fourteenth Amendment. Of course, the same principle applies in criminal proceedings, where even the general public is aware of the fact that persons accused of crimes may waive their rights (e.g., the right to remain silent and the right to have a lawyer) even though these rights are guaranteed by the Federal Constitution. *Johnson v. Zerbst*, 304 U. S. 458 (1938); *Fay v. Noia*, 372 U. S. 391 (1963). In criminal proceedings—where the stakes are much higher—the Federal courts enforce waivers every day.

A person may waive constitutional rights either in writing or by his conduct, in civil proceedings as well as criminal proceedings. *Coe v. Armour Fertilizer Works*, 237 U. S. 413 (1915), mistakenly relied on by appellants, clearly supports our position:

"... [T]he court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. *To do this without his consent—and the record shows no consent—is contrary to fundamental principles of justice.*" 237 U. S. at 426. (Emphasis added.)

Even if the Fourteenth Amendment guarantees rights not provided under Pennsylvania law, these rights—like other constitutional rights—may be waived. But we submit that the confession of judgment procedure does not violate the Fourteenth Amendment—with or without a waiver.

CONCLUSION.

For the reasons stated above, we respectfully request that the Court affirm the judgment of the lower court.

Respectfully submitted,

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